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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOSEPH A. LaSCALA,

Petitioner,

-against-

BURLINGTON NORTHERN, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA**

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QUESTION PRESENTED

Whether the state courts' refusal to apply controlling Federal authority on the Federal Employers' Liability Act (FELA) and Federal Safety Appliance Act, in violation of the rule that federal law applies in a FELA action brought in state court, constitutes sufficient grounds for granting a petition for writ of certiorari?

PARTIES BELOW

Petitioner:

Joseph LaScala

Respondent:

Burlington Northern, Inc.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA**

OPINIONS BELOW

The memorandum decision of the Ramsey County District Court, State of Minnesota, denying petitioner's motion for a new trial and ordering the entry of judgment is unreported and is set forth in the appendix at A-6. The order of the Minnesota Supreme Court summarily affirming the trial court's decision without comment is unreported and is set forth in the appendix at A-10. The unreported judgment is set forth at A-11.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on January 18, 1984 (A-11). No petition for re-

hearing was filed due to the absence of any written decision specifying the reasons for the court's summary order. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3) (1976).

STATUTORY AND REGULATORY PROVISIONS

Relevant portions of statutory and regulatory provisions involved herein appear in the appendix at the end of this petition at A-19.

STATEMENT OF THE CASE

Petitioner Joseph LaScala commenced this action in state court against his employer, respondent Burlington Northern, Inc., under the Federal Employers' Liability Act, 45 U.S.C. § 51-60 (1976), to recover for injuries sustained within the course of his employment. His two primary theories of liability were based on federal law: the railroad's violations of minimum truck safety standards of the Federal Railroad Administration (FRA) and the Federal Safety Appliance Act, 45 U.S.C. § 1-10 (1976). On April 5, 1980, LaScala was employed as a switchman in Burlington Northern's Sioux City, Iowa railroad yards (T. 25).¹ It was his job to help assemble and disassemble freight trains in the switchyard (T. 165). On that morning, LaScala's supervisor instructed him to throw the high-target switch on the main line after Train X-59 departed from the yards (T. 27). The supervisor told LaScala that he could catch a ride on the caboose of the X-59 as it rolled by so that the train wouldn't have to stop. (*Id.*)

¹References are to the trial transcript.

LaScala, taking his supervisor's advice, walked over to the main line and waited for the caboose (T. 30). Burlington Northern had instructed its employees to board moving cars with their right foot first when the train is moving from right to left, as in this case, and to take hold of the grab iron with both hands in order to swing with the movement of the train (T. 30). LaScala watched the caboose approach and he had his foot positioned (T. 31). The train was not moving too fast to board (T. 32, 63). LaScala reached for the grab iron and put his right foot on the bottom step of the caboose, as he had done many times before in accordance with railroad instructions (T. 30-31). However, this time the step "wasn't there" and LaScala nearly had to straighten out his leg to reach it (T. 30-31). The bottom step of the caboose was six to 12 inches lower than normal (*Id.*). Just as his right foot hit the step and he grabbed the iron, LaScala felt a "devastating jerk" that pulled his hands free and caused him to lose his balance (*Id.*). LaScala "felt like there was butter" on the bottom of his shoes (T. 31-32). He was thrown off the caboose and its rear wheels rolled over his legs (*Id.*). Both legs were amputated below the knee (T. 53-54).

It was petitioner's position that the accident was caused by the slimy, befouled condition of the switchyard where the accident occurred, which condition was exacerbated by the impermissible unevenness of the tracks and the excessive speed of the train (all in violation of minimum track safety regulations of the Federal Railroad Administration), in addition to a handbrake that was illegally applied in violation of the Federal Safety Appliance Act. Petitioner presented testimony and documentary evidence that established fact questions for the jury on the railroad's violation

of the federal minimum track safety regulations. He requested instructions on the federal regulations and that their violation created a rebuttable presumption of negligence (T. 700). However, the trial court found that there was "no evidence" in the record regarding a violation of any of these regulations, in effect ruling as a matter of law that the railroad had met the federal standards in all respects (T. 701; A-5). The court refused to instruct the jury on the federal regulations (*Id.*).

Furthermore, the trial court ignored controlling federal authority construing the Federal Safety Appliance Act—the case law required the court to find a violation of the federal statute as a matter of law by virtue of the handbrake which the railroad admitted had been tied down at the time of the accident. The court refused to find a violation as a matter of law (T. 685). Thus, the trial court denied petitioner his rights with respect to his two primary theories of liability that were based on controlling federal law.

Federal Railroad Administration Regulations

Petitioner's evidence clearly created a jury issue as to each of the four sets of federal minimum track safety standards. First, the roadbed had to be maintained and kept free of obstruction to accommodate expected water flow. 49 C.F.R. § 213.33. However, grain and meal were frequently spilled throughout the area near the main line where the accident occurred (T. 34, 35). Additional spillage occurred when grain cars were coupled in the yard (T. 35-36). Richard Newburn, the rear brakeman in the caboose of the X-59, testified that there was grain and meal in the area around the main line and track one, where LaScala had been standing as the caboose approached (T. 190-91). The

grain and meal had combined with pools of water and mud to make a slippery and greasy mixture (T. 191, 233-35; See Exhibits C and D, at A-13, 14). Newburn also noted meal debris on the bottom of petitioner's boots and on the caboose steps after the accident (T. 190-96). Vito Dattolico, a switchman and brakeman with nearly 30 years of experience, had observed bran blowing and drifting from a nearby mill since the 1960's, as well as frequent spillage from railroad cars (T. 227-30). Dattolico testified that on the date of the accident, there was a quarter inch of grain and bran accumulation in the area where LaScala had attempted to board the caboose (T. 230-31). Bill Rose, the section foreman, testified that he had not scooped up the grain dust from this area since the fall of 1979 (T. 331). All this testimony created a jury issue as to the railroad's compliance with the regulation.

Second, an FRA regulation required that the railroad provide adequate drainage and support along the track and roadbed. 49 C.F.R. § 213.103. LaScala, Newburn and Dattolico noted meal and water accumulations alongside and between the rails of the main line, as confirmed in photographs of the scene that had been taken shortly after the accident (T. 37-44, 190-93, 229-31, Exhibits C and D). The poor condition of the mainline (Ex. C and D) was in marked contrast to the good condition of a nearby track (See Ex. J, A-15). Bran and clay collected and formed a base underneath the water, preventing proper drainage in violation of the regulation (T. 235, Exhibits C and D). There was clearly evidence to support an instruction on the drainage regulation.

Third, FRA regulations specified that the rails could not dip more than three inches under load, 49 C.F.R. § 213.13,

.63. Petitioner presented evidence and exhibits to establish violations. LaScala attributed the six to 12 inch dip of the caboose step as he was boarding to the poor condition of the track roadbed at the site. (T. 31). Newburn and Dattolico attributed this dip to the low joints in the rails of the main line at this location (T. 206-07, 233-34). The track in this area was unstable and uneven and the meal and lack of ballast had caused insufficient drainage and water accumulation along the main line (T. 199, 230-35, Exhibit D). As the trains rolled along the main line, the heavy load caused a "pumping action" that forced the ballast and soil away from the main line (T. 45, Exhibit L, A-16). The ties moved up and down, squirting water into the walkway (T. 45). As a result, there was inadequate foundation and the trains dipped and rolled from side to side (T. 47, 206-08). Dattolico had observed moving train cars uncouple in this area when the draw bars slid off one another as a result of the dip (T. 234). He estimated that the main line would have to dip "approximately 9 inches", 6 inches more than permitted, for this to occur (T. 233-34). Newburn, who was riding on the caboose, noticed dipping and cross-rolling at the point of the accident (T. 207). He estimated the dipping action on the main line at 6 to 7 inches (T. 206). There was clearly evidence to support an instruction on this regulation.

Fourth, the railroad regulations specified that train speed could not exceed 10 m.p.h and that operations were not permitted over defective segments. 49 C.F.R. § 213.9. Two railroad witnesses admitted that the railroad might have violated this regulation. Roger Mackenroth, the trainmaster in Willmar, examined the speed tapes, which measured the speed of the engine (T. 538). The tapes showed that the

engine was traveling at 10 to 11 m.p.h. at the time of the accident (T. 541). The engineer, Anthony Pierce, estimated the speed of the train at 10 to 13 m.p.h. (T. 327). Nonetheless, the trial court found that there was "no evidence" to support an instruction.

The trial court refused to instruct the jury on the contents of the four sets of regulations, which were clear and simple to understand without the need for expert testimony (See Requested Jury Instruction No. 47, Appendix at A-1). Significantly, the jury was never instructed on the legal effect of their violation, e.g. that any violation of the law by the railroad, however slight, was negligence. The railroad's failure to comply with directly applicable regulations was a crucial element of petitioner's case.

The FRA regulations were binding on the state court in this FELA action. *Rogers v. Mo. Pacific Ry. Co.*, 352 U.S. 500 (1957). *Rogers* mandated that the state court instruct the jury on the federal minimum track safety standards. Petitioner introduced evidence to create a jury issue as to whether or not the rails had dipped more than three inches in violation of 49 C.F.R. § 213.13, .63; to show that the train was traveling in excess of 10 m.p.h. in violation of 49 C.F.R. § 213.9; to establish that the roadbed was obstructed with grain and meal in violation of 49 C.F.R. § 213.33; and that inadequate drainage from the lack of ballast had caused pools of water to collect along side and between the rails in violation of 49 C.F.R. § 213.103. Incredibly, the requested instructions on the federal regulation were denied on the grounds that there was "no evidence" to create a jury issue on any of the four sets of federal regulations (T. 701, See A-5). Federal law required that the regulations be given. See *Rogers v. Mo. Pacific Ry.*

Co., 352 U.S. 500 (1957). Justice mandates that certiorari be granted due to the state courts' failure to apply controlling federal authority.

Federal Safety Appliance Act

The trial court also denied petitioner his rights under his second major theory of liability based on federal law: that the railroad violated Sections 1 and 9 of the Federal Safety Appliance Act, 45 U.S.C. § 1-10,⁸ by permitting the X-59 to depart the yard with an applied handbrake, and that the violation renders the railroad liable for all injuries caused thereby. The statute required that the engineer be able to use and operate all power brakes from the engine.⁹ The evidence established a violation of that statute as a matter of law because the engineer was unable to use and operate the power brakes in the car with the smoky brake since the brakeshoes were already applied due to the applied handbrake.

Section 1 provides in pertinent part:

"It shall be unlawful for any . . . railroad . . . to run any train . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer . . . can control its speed. . ."

⁸Congress enacted the Federal Safety Appliance Act for the protection of railroad employees and intended that it be liberally construed to promote this beneficent purpose. *Fairport P. & E. R. Co. v. Merideth*, 292 U.S. 589 (1934). Nothing less than literal compliance with the terms of the Act will suffice. *O'Donnel v. Elgin, Joliet & Eastern Ry.*, 338 U.S. 384 (1949).

⁹The power brakes, which were controlled by the engineer from the front of the train, and the handbrakes, which were controlled by a chain on each car, used the same set of brakeshoes (T. 207-13). Handbrakes could only be released manually on an individual car, not by the engineer at the front of the train (*Id.*).

Congress subsequently enacted section 9, which specifies the percentage of cars that must be equipped with power brakes:

"Whenever . . . any train is operated with power or train brakes not less than 50 percent of the cars shall have their brakes used and operated by the engineer . . . and all power brake cars . . . which are associated with said 50% shall have their brakes so used and operated. . ."

Section 9 also empowered the Secretary of Transportation to "increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid," which the Secretary of Transportation did in 49 C.F.R. § 232.1. The net effect of the regulation is to require that 100% of the cars in a train which are "associated", or connected on the power brakes line, must be "used and operated" by the engineer from the locomotive. *United States v. Panhandle & S.F. R. Co.*, 21 F.Supp. 919 (S.D. Tex. 1937).

The engineer testified that the head brakeman had found an applied handbrake near the middle of the train about 10 miles outside of the switchyard (T. 328). The friction from the brakeshoe rubbing against the railroad wheel had caused smoke (T. 210). This condition should not have existed because the railroad was required to release all brakes and conduct an inspection of the train before it left the yard (T. 209, 254). Richard Newburn testified that the smoking handbrake caused "slack action" on all following cars, including the caboose, as LaScala attempted to board (T. 210-12). As the engineer reduced speed, the car with

the applied handbrake stopped faster (*Id.*). The cars behind the smoking handbrake reacted differently from those in front of it (*Id.*). Cars behind the applied handbrake would bump into each other like dominos (T. 211). Newburn testified that the engineer could not properly control the speed of the engine as a result (*Id.*). Vito Dattolico agreed that an applied handbrake could cause slack action, i.e., the domino bump effect (T. 263).

In fact, the engineer testified that he had to shut off the throttle several times as he was leaving the yards, at the time LaScala was boarding the train (T. 327). The engineer recalled that he had stopped the train a second time after noticing the smokey car and that the train "seemed like it handled a little bit better" after the handbrake was released (T. 329). Harlo Weaver, the yardmaster, also agreed that "the slack could run in a little" behind an applied handbrake (T. 331). Nonetheless, the trial court refused to find a violation of the federal statute as a matter of law.

It is undisputed that all the cars in the X-59 were "associated". The engineer was unable to use and operate the power brake in one of the railroad cars (the smokey car) because its hand brake was tied down. Both the power brake and the hand brake employed the same set of brake shoes. The engineer could not release the hand brake from the engine. As a result, the engineer was not able to use and operate the brakes on this car, much as an automobile driver cannot use his foot brake efficiently when the emergency brake is applied. Thus, the evidence established a violation of the act as a matter of law. The railroad's contention that the handbrake was only partially on deals with the separate issue of proximate cause, which was never addressed by the jury.

An analogous situation was presented to this Court in *N.Y. Central R.R. Co. v. United States*, 265 U.S. 41 (1924), where three cars in the middle of a 63-car train became defective in an unspecified manner. The power brakes in the three cars were cut out "because of the liability of such brakes to stick and cause damage and delay. . ." 265 U.S. at 43. The engineer could still use and operate the power brakes on the cars ahead and behind these three cars. The court held that the railroad had violated Section 9 of the Act: "The unlawfulness of the operation resulted from the association on the air line of cars having defective brakes with cars having brakes operated by the engineer." 265 U.S. at 46.

Similarly, in *United States v. Atchinson, Topeka and Santa Fe Ry. Co.*, 205 F.Supp. 589 (S.D. Ca. 1962), the power brakes on one boxcar failed to operate. The court found that Section 9 was designed in part to prevent slack action and held that it was violated "whenever even one car connected on the air brake line does not have its air brakes operative." 205 F.Supp. at 591.

While the deficiency in *Atchinson* was the engineer's inability to apply the brake, as contrasted from this case, in which the engineer was unable to release the brakes, the safety consideration is identical: in neither case can the engineer use and operate the brakes so as to prevent slack action. It is significant to note that an FRA regulation required the railroad to visually inspect all brakes prior to departure to determine that all brakes had been released. 49 C.F.R. § 232.12. If Congress did not intend to make the engineer's inability to release an air brake a violation of the statute, the regulation promulgated by the agency charged with enforcing railroad safety would be rendered

superfluous. The state courts were bound by the Supremacy Clause and controlling federal authority to find a violation of the Federal Safety Appliance Act as a matter of law.

Jury Verdict

The jury found that Burlington Northern was not negligent; that the railroad did not violate the Federal Safety Appliance Act; it did not answer the causal negligence question as to Burlington Northern; that LaScala was negligent; that his negligence was a cause of his injuries; and that LaScala had suffered damages of \$600,000.00. Petitioner moved for a new trial alleging, *inter alia*, that the trial court erred in finding that there was "no evidence" regarding violations of the minimum track safety standards of the Federal Railroad Administration and in refusing to instruct the jury on the contents of the regulations and on the legal effect of their violation, and furthermore, that the trial court erred in refusing to find a violation of the Federal Safety Appliance Act as a matter of law. Petitioner's post-trial motion on the two federal questions was denied (Appendix at A-6) and a timely appeal was taken to the Minnesota Supreme Court on these two federal questions (Notice of Appeal and Prehearing Conference Statement.). The Minnesota Supreme Court summarily affirmed the decision without comment (A-10).

REASONS FOR GRANTING THE WRIT

The Minnesota District Court and Minnesota Supreme Court decided two important federal questions in direct conflict with controlling decisions of the United States Supreme Court and the Federal Court of Appeals: first, the state courts denied petitioner the protections afforded to

him by the minimum track safety standards of the Federal Railroad Administration; and second, the state courts substantially prejudiced petitioner by refusing to find that the railroad had violated the Federal Safety Appliance Act as a matter of law. The state court's resolution of these federal questions was directly contrary to controlling federal decisions brought to the courts' attention. Certiorari should be granted to restore petitioner's rights under the federal statutes, regulations and decisions of law, and to insure that state courts hearing FELA actions apply controlling federal authority to promote uniformity of decision.

Petitioner's choice of the Minnesota State Courts as the forum for this litigation under the Federal Employers' Liability Act should have had no impact on the case—the right of action under the Act is entirely a creation of federal law. The rights that the Act creates are federal rights which are protected by federal, rather than local, rules of law. *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1943). The state court was required to apply the federal law regardless of what it would do in a similar case arising under state law. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952). The state court could not look to its own law to determine the federal rights that were given to railroad employees under the Act. Rather, in order to avoid impairment by the states of a federally declared standard, and to give uniform application to the Act throughout the country, uniform federal law applies. *Norfolk Southern Ry. Co. v. Frebee*, 238 U.S. 269 (1915). The state court is bound by the language of the Act itself, and the decisions of the United States Supreme Court construing it. *Erie v. Thompson*, 337 U.S. 163 (1949). Additionally, decisions of the lower federal courts construing the Act provide persuasive authority. *Young v.*

New York Central Ry. Co., 88 Ohio App. 353, 88 N.E.2d 220 (1949). Nonetheless, the state court refused to apply controlling federal authority and refused to recognize that standards for liability in a FELA action are significantly broader than in an ordinary common law negligence action. See *Nivens v. St. L. Southwestern Ry. Co.*, 425 F.2d 111 (5th Cir.) cert. den. 400 U.S. 879 (1970).

The act is liberally construed by the courts to allow employees injured in the course of their employment to recover even where the negligence of the employer is minimal. *Rodriguez v. Del Ray Connecting R.R.*, 473 F.2d 819 (6th Cir. 1973). In a FELA action, the employer is liable if its negligence played any part, even the slightest, in producing the employee's injury. *Rogers v. Mo. Pacific R.R. Co.*, 352 U.S. 500 (1957). The test for a jury issue in a FELA case is whether the proof, even though entirely circumstantial, justifies with reason the conclusion that the employer's negligence played even the slightest part in producing the injury. *Id.* When this test is met, the court must find that a jury case exists, notwithstanding that the jury could reasonably attribute the result to other causes as well, including the employee's contributory negligence. *Id.*

The state courts refused to apply these standards. The decisions below demonstrate no concern for the element of uniformity of decision without regard to choice of forum. The decisions below are clearly contrary to controlling decision of this Court as well as other federal courts. These federal decisions mandated that the jury be instructed on the FRA minimum track safety standards and the legal effect of their violations, and required that the court find a violation of the Federal Safety Appliance Act as a matter of law.

CONCLUSION

This case presents important questions which arise when a severely injured railroad employee chooses to assert his rights under the Federal Employers' Liability Act in a state court forum. The overriding need for uniformity of decision, regardless of the forum, has repeatedly been expressed by this Court in decisions construing the Act. The decisions below in this case clearly evidence a lack of uniformity and a complete failure to apply controlling federal law. The petitioner's choice of a state court forum in this case, and the state courts' refusal to apply controlling federal authority, substantially prejudiced petitioner's rights.

The petition for a writ of certiorari should be granted.

Dated: March 20, 1984

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APPENDIX

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PLAINTIFF'S REQUESTED INSTRUCTION NO. 47 EFFECT OF A VIOLATION OF LAW

If you find from a preponderance of the evidence in the case that the defendant, by some act or failure to act, violated the provisions of Federal Railroad Administration Rules, such conduct in violation of the law is presumed negligent. This presumption of negligence is not, however, conclusive, but may be overcome or outweighed by evidence in the case, which satisfies your minds that, notwithstanding any failure to comply with the provisions of law in question, the defendant acted as a reasonably prudent person would have acted under all the surrounding circumstances shown by the evidence in the case.

And you will bear in mind, of course, that a finding of negligence, based upon a violation of law by the defendant, will not justify a verdict in favor of the plaintiff, unless the violation of law was a cause, however slight, of an injury or damage found by you to have been suffered by the plaintiff's decedent.

Federal Jury Practice and Instructions—3rd Ed., Ch. 80,
Devitt and Blackmar, §80.14

CODE OF FEDERAL REGULATIONS PART 213—TRACK SAFETY STANDARDS SUBPART A—GENERAL

§213.13 MEASURING TRACK NOT UNDER LOAD.

When unloaded track is measured to determine compliance with requirements of this part, the amount of rail movement, if any, that occurs while the track is loaded must be added to the measurement of the unloaded track.

CODE OF FEDERAL REGULATIONS
PART 213—TRACK SAFETY STANDARDS
SUBPART B—ROADBED

§213.33 DRAINAGE.

Each drainage or other water carrying facility under or immediately adjacent to the roadbed must be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

CODE OF FEDERAL REGULATIONS
PART 213—TRACK SAFETY STANDARDS
SUBPART D—TRACK STRUCTURE

§213.103 BALLAST: GENERAL.

Unless it is otherwise structurally supported, all track must be supported by material which will—

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
 - (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
 - (c) Provide adequate drainage for the track; and
 - (d) Maintain proper track cross-level, surface, and alinement.
-

**CODE OF FEDERAL REGULATIONS
PART 213 — TRACK SAFETY STANDARDS
SUBPART A — GENERAL**

§213.9 CLASSES OF TRACK: OPERATING SPEED LIMITS.

(a) Except as provided in paragraphs (b) and (c) of this section and §§213.57(b), 213.59(a), 213.105, 213.113(a) and (b), and 213.137(b) and (c), the following maximum allowable operating speeds apply:

(In miles per hour)

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

**CODE OF FEDERAL REGULATIONS
PART 213 — TRACK SAFETY STANDARDS
SUBPART C — TRACK GEOMETRY**

§213.63 TRACK SURFACE.

Each owner of the track to which this part applies shall maintain the surface of its track within the limits prescribed in the following table:

Track surface	Class of track					
	1	2	3	4	5	6
The runoff in any 31 feet of rail at the end of a raise may not be more than . . .	3½"	3"	2"	1½"	1"	¾"
The deviation from uniform profile on either rail at the midordinate of a 62-foot chord may not be more than	3"	2¾"	2¼"	2"	1¼"	¾"
Deviation from designated elevation on spirals may not be more than	1¾"	1½"	1¼"	1"	¾"	½"
Variation in cross level on spirals in any 31 feet may not be more than . .	2"	1¾"	1¼"	1"	¾"	½"
Deviation from zero cross level at any point on tangent or from designated elevation on curves between spirals may not be more than . .	3"	2"	1¾"	1¼"	1"	¾"
The difference in cross level between any two points less than 62 feet apart on tangents and curves between spirals may not be more than . .	3"	2"	1¾"	1¼"	1"	¾"

TRANSCRIPT ON REQUESTED JURY INSTRUCTION NO. 47 (T. 700-01)

MR. YAEGER: Last night I mentioned, Your Honor, we have a requested on these F.R.A. track standards.

THE COURT: The track standards?

MR. YAEGER: F.R.A. track standards, talking about a class 1 track. There is a requirement that they keep—provide adequate drainage.

MR. SPENCE: Judge, there is just no evidence anywhere in the record by anyone.

THE COURT: Is this the requested instruction you have, number 47?

MR. YAEGER: Your Honor, F.R.A. standards that require adequate drainage, that we talked about in the trial. There is an F.R.A. requirement that they have no more than three inches of deviation on the track, and some of the testimony was that it was up to a foot.

THE COURT: Oppose that requested instruction?

MR. SPENCE: Certainly do.

THE COURT: That requested instruction is denied. It's not supported by the evidence. No evidence to support it.

MR. YAEGER: Will you keep a copy, Judge, so that we can—

THE COURT: You can put it in the record afterwards. Anything else? Anything else in here before Mr. Erdmann starts typing?

MR. YAEGER: No.

MR. SPENCE: Nothing.

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

JOSEPH A. LaSCALA,

Plaintiff,

-vs-

BURLINGTON NORTHERN, INC., a Corporation,
Defendant.

ORDER

This matter is before the Court on motion of the Plaintiff for a new trial. The plaintiff was represented by his attorneys, William J. Yaeger and John B. McCarthy of Yaeger and Yaeger, 247 Third Avenue South, Minneapolis, Minnesota, and the Defendant was represented by its attorneys, Richard A. Rohleder of Stringer, Courtney & Rohleder, 1200 Northwestern National Bank Building, St. Paul, Minnesota, and Harold K. Bradford, Jr., 176 East Fifth Street, St. Paul, Minnesota. At the second hearing Thomas Spence, who represented Defendant throughout the trial, also appeared by special permission and presented arguments on behalf of Defendant. Both sides have also filed extensive briefs and affidavits.

Based upon the evidence at trial and the briefs and arguments of the respective counsel,

IT IS ORDERED that the motion of the Plaintiff for a new trial is denied.

The following memorandum is made a part of this Order.

OTIS H. GODFREY, JR.,
Judge of District Court

DATED: August 10, 1982.

MEMORANDUM

The case arose out of an unfortunate accident on April 5, 1980 in Defendant's Sioux City switchyards. Mr. LaScala, a Burlington Northern switchman, attempted to board the front end of an outgoing caboose, but slipped and fell under the car's wheels. Subsequent surgeries were unable to repair the extensive damage to his legs, both of which were amputated below the knee.

During the eight day trial numerous witnesses testified concerning ground cover, the weather, the tracks and moving stock of the railroad, the training of employees and the general working conditions in the Sioux City yard. Sixty exhibits were introduced by the parties.

All fact issues were submitted to the jury which returned a special verdict in favor of the Defendant on April 30, 1982. In the opinion of the Court that verdict is amply supported by the evidence. The Court could not rule, as a matter of law, that any Federal regulation had been violated by Defendant as to track maintenance, braking system or any other matter. At best Plaintiff presented enough evidence, however slight, to permit all fact issues to go to the jury.

After the verdict was reached, counsel for Plaintiff talked to some jury members and advised them of the legal consequences of the special verdict. In the course of a telephone conversation, the foreman told Mr. Yaeger, of his acquaintanceship with Roger Mackenroth, a Burlington Northern supervisor stationed in Willmar who was called as a witness late in the trial. Upon Plaintiff's motion the Court held a so-called Schwartz hearing (Schwartz v. Mpls. Suburban Bus Co., 258 Minn. 325, 104 NW2d 301, 1960) relative to this matter.

It was brought out by testimony of the juror and by affidavits that the juror had been acquainted with witness Mackenroth when they both attended Harding High School in St. Paul in the late 1950s. During that time they did have some minimal contact, but the witness moved from St. Paul in 1965 and had not seen the juror for over 20 years.

The juror did play on a softball team with a brother of witness Mackenroth for a couple of years and was generally acquainted with the Mackenroth family. The witness' brother moved from St. Paul some six years ago and has had minimal contact with the juror since that time. It should be noted that the names and residences of all prospective witnesses, including Roger Mackenroth of Willmar, were read to the prospective jurors, and no one indicated that they knew that witness or recognized the name.

After some seven days of trial, at a recess called by the Court for procedural discussion in chambers, the juror had come to the bench and said he did now recognize witness Mackenroth as someone he had known in high school. The Court attached little significance to the statement under the circumstances, and did not call it to the attention of counsel. The legal and procedural matters were then reviewed in chambers and the trial proceeded to conclusion. Plaintiff now argues that the Court's failure to tell counsel immediately of the discussion with the juror was error and deprived Plaintiff of a fair trial.

The testimony of witness Mackenroth was mainly cumulative evidence, he being one of five or six witnesses who told about the condition of the caboose involved in this accident.

The Court has reviewed all of the facts brought out at the Schwartz hearing and considered them in the light of the trial, along with the arguments of counsel. There has been no error which could have materially prejudiced the Plaintiff. The case was vigorously tried by both sides and all facts were properly submitted to the jury. Witness Mackenroth's testimony was relatively minor, and any acquaintance of the juror with him could not have materially affected the ultimate jury decision that Defendant was free of any negligence that caused this unfortunate accident.

Prior to and during trial the Plaintiff turned down substantial offers of settlement. Having received an adverse verdict, he now seeks to have it set aside. As our Supreme Court stated in *Peters v. Peterson*, 265 Minn. 131, 120 N.W.2d 346, new trials are to be granted only for errors materially affecting the substantial rights of the aggrieved party. Moreover, new trials will not be granted even where there is error if from the whole case it appears that the result would not be changed.

The Court has also viewed *Coleman v. Burlington Northern Railway Co.*, (8th CCA, June 28, 1982), and those facts and law are applicable herein: alleged failure of equipment; jury issue where reasonable minds could differ as to any violation of federal regulations; rules to be followed by our courts in setting aside jury verdicts.

In the instant case the verdict is amply supported by the evidence, even assuming any misconduct or bias, which the Court does not find. Accordingly the motion of Plaintiff must be denied.

O.H.G.

A-10

STATE OF MINNESOTA
IN SUPREME COURT
C6-82-1223

JOSEPH A. LaSCALA,	Yaeger & Yaeger
	William J. Yaeger
Appellant,	247 Third Avenue South
	Minneapolis, MN 55415
	and
	Meagher, Geer, Markham, Anderson,
	Adamson, Flaskamp & Brennan
	Robert E. Salmon
	O. C. Adamson, II
	2250 IDS Center
	Minneapolis, MN 55402
 BURLINGTON	 Donald E. Engle
NORTHERN, INC.	Harold K. Bradford, Jr.
	Ronald W. Eubanks
Respondent.	Steven D. Meier
	176 East Fifth Street
	St. Paul, MN 55101

Considered and decided by the court en banc without oral argument.

ORDER

IT IS HEREBY ORDERED that the order of the Ramsey County District Court, the Honorable Otis H. Godfrey, Jr., dated August 10, 1982, be, and the same is, affirmed pursuant to Rule 136.01(2), Rules of Civil Appellate Procedure.

Dated: December 29, 1983.

BY THE COURT

/s/ JOHN J. TODD
Associate Justice

JUSTICE COYNE took no part in the consideration or decision of this case.

A-11

STATE OF MINNESOTA
IN SUPREME COURT
C6-82-1223

JOSEPH A. LaSCALA,

Appellant,

vs.

BURLINGTON NORTHERN, INC.,

Respondent.

JUDGMENT

Pursuant to an order of court heretofor duly made and entered in this cause, it is determined and adjudged that the order of the court below herein appealed from to wit of the District Court within and for the County of Ramsey be and the same hereby is affirmed pursuant to Rule 136.01(2) of the Rules of Civil Appellate Procedure and the judgment be entered accordingly.

A certified copy of the entry of judgment and the court's decision is herein transmitted and made a part of the remittitur.

/s/ WAYNE TSCHIMPERLE

Dated: 1/18/84

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**APPENDIX OF STATUTORY AND
REGULATORY PROVISIONS**

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STATUTES
FEDERAL SAFETY APPLIANCE ACT
45 U.S.C. 1, 9 (1976)

§1. Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

§9. Power or train brakes; operation by engineer; rules for installation, inspection, maintenance, and repair

Whenever, as provided in sections 1 to 7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Secretary of Transportation may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. The rules, standards, and instructions of the Association of American

Railroads, adopted in 1925 and revised in 1933, 1934, 1941, and 1953, with such revisions as may have been adopted prior to the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad shall remain the rules, standards, and instructions for the installation, inspection, maintenance, and repair of all power or train brakes unless changed, after hearing, by order of the Secretary of Transportation: *Provided, however,* That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars, and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Secretary of Transportation may utilize the services of the Association of American Railroads, and may avail himself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation, or requirement promulgated by the Secretary of Transportation pursuant to the provisions of this section shall be subject to the like penalty as failure to comply with any requirement of this section.

§213.9 CLASSES OF TRACK: OPERATING SPEED LIMITS.

(a) Except as provided in paragraphs (b) and (c) of this section and §§213.57(b), 213.59(a), 213.105, 213.113 (a) and (b), and 213.137 (b) and (c), the following maximum allowable operating speeds apply:

(In miles per hour)

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

(b) If a segment of track does not meet all of the requirement for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if it does not at least meet the requirements for class 1 track, no operations may be conducted over that segment except as provided in §213.11.

(c) Maximum operating speed may not exceed 110 m.p.h. without prior approval of the Federal Railroad Administrator. Petitions for approval must be filed in the manner and contain the information required by §211.11 of this chapter. Each petition must provide sufficient information concerning the performance characteristics of the

track, signaling, grade crossing protection, trespasser control where appropriate, and equipment involved and also concerning maintenance and inspection practices and procedures to be followed, to establish that the proposed speed can be sustained in safety.

§213.63 TRACK SURFACE.

Each owner of the track to which this part applies shall maintain the surface of its track within the limits prescribed in the following table:

Track surface	Class of track					
	1	2	3	4	5	6
The runoff in any 31 feet of rail at the end of a raise may not be more than . .	3½"	3"	2"	1½"	1"	½"
The deviation from uniform profile on either rail at the midordinate of a 62-foot chord may not be more than	3"	2¾"	2¼"	2"	1¼"	½"
Deviation from designated elevation on spirals may not be more than	1¾"	1½"	1¼"	1"	¾"	½"
Variation in cross level on spirals in any 31 feet may not be more than . .	2"	1¾"	1¼"	1"	¾"	½"
Deviation from zero cross level at any point on tangent or from designated elevation on curves between spirals may not be more than . .	3"	2"	1¾"	1¼"	1"	½"
The difference in cross level between any two points less than 62 feet apart on tangents and curves between spirals may not be more than . .	3"	2"	1¾"	1¼"	1"	¾"

§213.13 MEASURING TRACK NOT UNDER LOAD.

When unloaded track is measured to determine compliance with requirements of this part, the amount of rail movement, if any, that occurs while the track is loaded must be added to the measurement of the unloaded track.

§213.103 BALLAST; GENERAL.

Each drainage or other water carrying facility under or immediately adjacent to the roadbed must be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

§232.1 POWER BRAKES; MINIMUM PERCENT-

Unless it is otherwise structurally supported, all track must be supported by material which will—

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface, and alinement.

§232.1 POWER BRAKES; MINIMUM PERCENT-AGE.

On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any

train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

§232.12 INITIAL TERMINAL ROAD TRAIN AIR-BRAKE TESTS.

(a) Except for run-through and unit run-through trains covered under §232.19, each train must be inspected and tested as specified in this section at points—

(1) Where the train is originally made up (initial terminal);

(2) Where train consist is changed, other than by adding or removing a solid block of cars, and the train brake system remains charged; and

(3) Where the train is received in interchange.

(b) Each carrier shall designate additional inspection points not more than 500 miles apart where intermediate inspection will be made to determine that—

(1) Brake pipe pressure leakage does not exceed 5 pounds per minute;

(2) Brakes apply on each car in response to a 20-pound service brake pipe pressure reduction; and

(3) Brake rigging is properly secured and does not bind or foul.

(c) Train airbrake system must be charged to required air pressure, angle cocks and cutout cocks must

be properly positioned, air hose must be properly coupled and must be in condition for service. An examination must be made for leaks and necessary repairs made to reduce leakage to a minimum. Retaining valves and retaining valve pipes must be inspected and known to be in condition for service. If train is to be operated in electropneumatic brake operation, brake circuit cables must be properly connected.

(d)(1) After the airbrake system on a freight train is charged to within 15 pounds of the setting of the feed valve on the locomotive, but to not less than 60 pounds, as indicated by an accurate gauge at rear end of train, and on a passenger train when charged to not less than 70 pounds, and upon receiving the signal to apply brakes for test, a 15-pound brake pipe service reduction must be made in automatic brake operations, the brake valve lapped, and the number of pounds of brake pipe leakage per minute noted as indicated by brake pipe gauge, after which brake pipe reduction must be increased to full service. Inspection of the train brakes must be made to determine that angle cocks are properly positioned, that the brakes are applied on each car, that piston travel is correct, that brake rigging does not bind or foul, and that all parts of the brake equipment are properly secured. When this inspection has been completed; the release signal must be given and brakes released and each brake inspected to see that all have released.

(2) When a passenger train is to be operated in electropneumatic brake operation and after completion of test of brakes as prescribed by paragraph (d)(1) of this section the brake system must be recharged to not less than

90 pounds air pressure, and upon receiving the signal to apply brakes for test, a minimum 20 pounds electropneumatic brake application must be made as indicated by the brake cylinder gauge. Inspection of the train brakes must then be made to determine if brakes are applied on each car. When this inspection has been completed, the release signal must be given and brakes released and each brake inspected to see that all have released.

(3) When the locomotive used to haul the train is provided with means for maintaining brake pipe pressure at a constant level during service application of the train brakes, this feature must be cut out during train airbrake tests.

(e) Brake pipe leakage must not exceed 5 pounds per minute.

(f) (1) At initial terminal piston travel of body-mounted brake cylinders which is less than 7 inches or more than 9 inches must be adjusted to nominally 7 inches.

(2) Minimum brake cylinder piston travel of truck-mounted brake cylinders must be sufficient to provide proper brake shoe clearance when brakes are released. Maximum piston travel must not exceed 6 inches.

(3) Piston travel of brake cylinders on freight cars equipped with other than standard single capacity brake, must be adjusted as indicated on badge plate or stenciling on car located in a conspicuous place near brake cylinder.

(g) When test of airbrakes has been completed the engineman and conductor must be advised that train is in proper condition to proceed.

(h) During standing test, brakes must not be applied or released until proper signal is given.

(i) (1) When train airbrake system is tested from a yard test plant, an engineer's brake valve or a suitable test device must be used to provide increase and reduction of brake pipe air pressure or electropneumatic brake application and release at the same or a slower rate as with engineer's brake valve and yard test plant must be connected to the end which will be nearest to the hauling road locomotive.

(2) When yard test plant is used, the train airbrakes system must be charged and tested as prescribed by paragraphs (c) to (g) of this section inclusive, and when practicable should be kept charged until road motive power is coupled to train, after which, an automatic brake application and release test of airbrakes on rear car must be made. If train is to be operated in electropneumatic brake operation, this test must also be made in electropneumatic brake operation before proceeding.

(3) If after testing the brakes as prescribed in paragraph (i)(2) of this section the train is not kept charged until road motive power is attached, the brakes must be tested as prescribed by paragraph (d)(1) of this section and if train is to be operated in electropneumatic brake operation as prescribed by paragraph (d)(2) of this section.

(j) Before adjusting piston travel or working on brake rigging, cutout cock in brake pipe branch must be closed and air reservoirs must be drained. When cutout cocks are provided in brake cylinder pipes, these cutout cocks only may be closed and air reservoirs need not be drained.

No. 83-1594

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FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOSEPH A. LaSCALA,

Petitioner,

-against-

BURLINGTON NORTHERN, INC.,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MINNESOTA**

DONALD E. ENGLE
RONALD W. EUBANKS
176 East Fifth Street
St. Paul, Minnesota 55101
(612) 298-2972
Counsel for Respondent

The following is a list of the parent company and its subsidiaries pursuant to Rule 28.1 of the Supreme Court Rules.

Parent Company: Burlington Northern Inc.

Subsidiaries: Burlington Northern Railroad Company; BN Transport Inc.; El Paso Exploration Company; El Paso Hydrocarbons Company; El Paso Natural Gas Company; Glacier Park Company; Meridian Land and Mineral Company; Milestone Petroleum Inc.; and Plum Creek Timber Company, Inc.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1594

JOSEPH A. LaSCALA,

Petitioner,

-against-

BURLINGTON NORTHERN, INC.,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MINNESOTA**

STATEMENT OF THE CASE

Petitioner Joseph A. LaScala, a switchman in the employ of respondent Burlington Northern Railroad Company, was injured in its Sioux City, Iowa railroad yards on April 15, 1980, when he attempted to board the front platform of a caboose coupled to the rear of outbound Train X-59, in violation of respondent's Safety Rule 73B, which provides that "Employees must, in boarding a caboose, get on at the rear platform." (T. 161, 351)

At trial, petitioner presented several theories of liability to the Court and the jury, among them that respondent was negligent for not properly instructing petitioner on the

safety rules, and for not providing petitioner with a copy of those rules; for not properly maintaining the track in the area of the accident; and for allowing debris and accumulations of grain and meal to accumulate in the walkway between the tracks. Petitioner also claimed that the caboose involved in the accident was defective, and that a partially applied handbrake on one of the 112 cars in Train X-59 amounted to a violation of the Federal Safety Appliance Act. Petitioner called three witnesses on the liability issue: petitioner himself, Richard Newburn, the rear brakeman on Train X-59, and Vito Dattolico, local chairman of the switchman's union. A statement by Anthony Pierce, the engineer of Train X-59, ostensibly supporting petitioner's position was read into evidence. Pierce's statement, however, supported respondent on the Safety Appliance Act issue. (T. 326, 327)

Respondent argued that it had not been negligent in any respect; that it had not violated the Safety Appliance Act; and that the accident and petitioner's injuries were due solely to his own negligence in attempting to board the front platform of the caboose in violation of Safety Rule 73B. Respondent called fourteen witnesses on the liability issue.

John Button testified that petitioner had undergone a five-day training session which included classroom and field training prior to his employment with the respondent, and had scored 95 percent on the written test given at the conclusion of the course. (T. 151, 345) Respondent's Safety Rule 73B was specifically covered during the course. (T. 161, 351) Six witnesses testified that the proper and safe method for boarding a moving caboose was by means of the rear platform. (T. 424-425, 486-487, 542, 592, 610, 627)

The track in the area of the accident had been examined pursuant to established company procedures two days prior to the accident and no defects had been found. (T. 478-480, 482) This same track had been inspected by a Federal Railroad Administration track inspector several months before the accident. His report showed no defects. (T. 504-508) The accident scene had been inspected within 20 minutes after the accident had occurred and no obstructions, defects or accumulations of grain and meal on the walkway were found. (T. 582, 585, 606) Approximately two years earlier the area along this track had been excavated and filled with rock and chips to facilitate drainage. (T. 608)

The caboose involved had been serviced at Alliance, Nebraska several months before the accident and had undergone visual inspection as it entered the Sioux City yards on the day of the accident. No defects were found. (T. 413-417, 636-639) The caboose had also undergone a detailed inspection on its final arrival at Willmar, Minnesota after the accident and again, no defects were found. (T. 450-457)

Train X-59 had undergone a roll-by inspection in the Sioux City yards shortly before the accident and no indications of a tightly-tied handbrake on any of the cars was noted. (T. 641) Given the absence of either skidding or a distinctive chattering noise from any of the cars during the roll-by inspection, witnesses testified that the handbrake could not have been tied down firmly enough to affect the movement of the train, and would most likely have been tied down in a rather loose manner. (T. 558-559, 560, 574-577) Engineer Pierce, whose statement was offered in-to evidence by petitioner, stated that he found the air brakes to be in proper working condition, and noticed nothing unusual in the operation of the train. (T. 326, 327)

The trial court instructed the jury on the Federal Employers Liability Act (T. 774), and the Federal Safety Appliance Act. (T. 775-776) On the issue of causation, the trial judge charged the jury that: "Injury or damage is said to be caused or contributed to by an act or a failure to act, when it appears from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage." (T. 779)

The jury returned a special verdict in which it found that respondent was not negligent, that the Safety Appliance Act had not been violated, and that petitioner was negligent. After denial of his post-trial motion, petitioner appealed the case to the Minnesota Supreme Court, raising the following issues: (1) whether the trial court committed reversible error in refusing to give petitioner's requested jury instruction No. 47; (2) whether the trial court committed reversible error in not ruling as a matter of law that respondent had violated the Safety Appliance Act; (3) whether the trial court committed reversible error in refusing to allow an interrogatory answer to be read into evidence; and (4) whether the fact that the jury foreman had known one of respondent's witnesses during his high school days had so prejudiced the petitioner that a new trial was warranted. Petitioner has again raised the first two issues in his petition for a writ of certiorari.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY REGARDING FEDERAL RAILROAD ADMINISTRATION REGULATIONS

Petitioner submitted his requested instruction No. 47 to the trial judge in chambers immediately prior to the con-

clusion of the instruction conference. This instruction consisted of language charging the jury that violation of Federal Railroad Administration rules raised a rebuttable presumption of negligence on the part of respondent. Attached to and incorporated within this instruction were reproductions of 49 C.F.R. §213.9, §213.13, §213.33, §213.63, and §213.103. The trial judge refused to give requested instruction No. 47 on the ground that petitioner had not presented any evidence at trial regarding the Federal Railroad Administration regulations. (T. 701)

Petitioner did not submit the Federal Railroad Administration regulations into evidence during his case in chief, nor did he call any witnesses to testify to any violations of the regulations. This lack of evidence is particularly important when one reads the regulations as submitted to the trial court. 49 C.F.R. §213.9 refers to exceptions found in other sections of the regulations, yet fails to delineate what those other sections involve. Section 213.13 deals with loaded and unloaded track without explaining exactly what these terms mean. Of particular opacity to even an intelligent layman is Section 213.63, which deals with deviation and track elevation. This regulation contains language referring to "deviation from zero cross level" and "designated elevation on curves between spirals." These regulations are technical in nature, and in the absence of any testimony dealing with the regulations would have only tended to confuse the jury.

The petitioner's failure to present any evidence on the regulations is of particular significance on two counts. Petitioner produced photographs at trial which were taken by his attorneys approximately two weeks after the accident. (T. 269) Thus, petitioner, his attorneys and any retained ex-

perts had ample opportunity to inspect the location of the accident shortly after the occurrence. In addition, and as the trial judge noted, the petitioner had listed a track expert as a potential witness on the first day of trial, but had failed to call this expert as a witness during trial. (Hearing on Plaintiff's Motion for a New Trial, T. 13.)

Requested instruction No. 47 was also inconsistent with statements made by petitioner's counsel earlier in the instruction conference. Petitioner's counsel had withdrawn his requested instruction specifically delineating the condition of the track as an element of negligence on the part of respondent. (T. 687-688) The trial judge asked petitioner's counsel five times whether he wished to withdraw this request. Each time petitioner's counsel unequivocally stated that he wanted the requested instruction withdrawn:

THE COURT: Well, you have in fact requested that and now you're telling the Court, I want it clear in the record, you do not want the Court to specify the particulars in which the Defendant is claimed to be negligent?

MR. YAEGER: That's true.

THE COURT: You are withdrawing that?

MR. YAEGER: Yes.

THE COURT: Okay. And having in mind what that case says, that it's error for the Court to omit it from the charge, and if requested, I suppose. I want to be absolutely certain that you don't want that given?

MR. YAEGER: You may be assured that we withdraw the request, and you may be absolutely certain that we do not ask for that.

THE COURT: Okay. And I am going to set out the record what has been withdrawn, and that is that the

defendant was negligent in one or more of the following particulars:

- '1. Failure to provide Joseph LaScala a safe place to work, by (a) permitting grain meal and dust to accumulate in unsafe amounts along side the Railroad's tracks; (b) failing to inspect and repair damaged and rotted rails and ties; and (c) failing to provide sufficient ballast between and along side the rails and ties;
2. Failure to provide Joseph LaScala with adequate training and instruction concerning Railroad safety rules and procedures;
3. Failure to provide Joseph LaScala with a copy of the railroad safety rule booklet; and Second, that the defendant's negligence caused or contributed in part to Joseph LaScala's injuries and damages.'

Now, that requested instruction is withdrawn, is that correct?

MR. YAEGER: That is correct.

THE COURT: There it is. I gather you don't want the Court to make any comment about the particularities of the Defendant's negligence? I gather that to be the case, but I want it stated on the record.

MR. YAEGER: That's true. I don't think we need to waste the time in going into that. (T. 690-691)

Petitioner's counsel requested instead that the trial judge charge the jury generally on the issue of negligence. (T. 691-692) Thus, petitioner's attorney first withdrew a specific requested instruction, asking instead for a general charge, and then inconsistently requested a highly technical specific instruction on regulations which had not been admitted into evidence, and on which he had not presented any testimony.

The only case which petitioner cites in support of his proposition that the trial judge erred by not giving requested instruction No. 47 is *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). However, *Rogers* involved neither FRA regulations nor jury instructions. *Rogers* simply held that: "Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506. Thus, *Rogers* is not on point.

The test for the sufficiency of jury instructions in FELA cases is whether the entire charge, when taken as a whole, correctly sets forth the applicable law, and is "fair and adequate based on the evidence presented and the contentions aired by the parties in the trial court." *Scrivener v. Atchison, Topeka and Santa Fe Ry. Co.*, 409 F.2d 1356, 1357 (5th Cir. 1969). An instruction based on an issue not before the jury need not be given. *Harris v. Chesapeake and Ohio Ry. Co.*, 358 F.2d 11, 14 (7th Cir. 1966). In the instant case, the Federal Railroad Administration regulations had not been presented to the jury during trial. Neither was there testimony that the track was defective at the point where the accident occurred. Thus, the requested instruction was properly refused.

The trial judge did instruct the jury on the Federal Employers Liability Act (T. 774) and the Federal Safety Appliance Act. (T. 775-776) The trial judge also properly instructed the jury on the correct standard of causation in FELA cases pursuant to *Rogers, supra*, stating the test as "that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage." (T. 779) In addition, petitioner's counsel was free to argue his theory of negligence based upon defective

trackage to the jury, and did so during trial and in final argument. (T. 737-743) Accordingly, the trial court's instructions, taken in their entirety, correctly stated the applicable law in FELA cases.

**THE TRIAL COURT PROPERLY PERMITTED THE ISSUE OF
RESPONDENT'S ALLEGED VIOLATION OF THE FED-
ERAL SAFETY APPLIANCE ACT TO GO TO THE JURY**

Petitioner contends that the trial court erred by refusing to rule as a matter of law that respondent had violated Sections 1 and 9 of the Federal Safety Appliance Act. 45 U.S.C. §§1-10 (1976). As pointed out by petitioner, the Safety Appliance Act and 49 C.F.R. §232.1 required that 85 percent of the cars in a train have their power brakes used and operated by the engineer. Petitioner is also correct in stating that 100 percent of the cars which comprise the 85 percent must be equipped with power brakes which can be used and operated by the engineer.

While petitioner goes to great lengths to establish this proposition of law, which respondent does not dispute, he does not explain why the evidence was so clear as to require the trial court to rule as a matter of law that respondent had violated these provisions. The only evidence which petitioner points to is testimony from one witness, Richard Newburn, that a single handbrake on one car in the 112-car train was tied down. Petitioner offered no evidence whatsoever that a partially tied down handbrake would have prevented the power brakes of the car in question from being "used and operated by the engineer." Thus, petitioner's evidence entirely failed to address this crucial point.

This case can be readily distinguished from those cited by the petitioner. In *New York Central R.R. Co. v. United States*, 265 U.S. 41 (1924) and *United States v. Atchison*,

Topeka and Santa Fe Ry. Co., 205 F.Supp. 589 (S.D. Cal. 1962), it was undisputed that the power brakes on one or more of the involved cars could not be used and operated by the engineer. In the present case, respondent introduced evidence that a partially tied down handbrake would not adversely affect the ability of the engineer to use and operate the power brakes on that car. Petitioner offered no evidence on this point. It is also noteworthy that petitioner offered no evidence with respect to the question of how far the handbrake had been tightened, even though the head brakeman who had released the handbrake was available and could have been called as a witness at trial.

The trial judge, in ruling upon petitioner's motion for a directed verdict, recognized the complete absence of evidence in support of petitioner's position that the engineer could not operate the power brakes on the train. (T. 674-675) At the time petitioner made his motion for a directed verdict, the trial court asked his counsel to identify the evidence upon which he relied in support of his motion. Petitioner's counsel was unable to point to any specific evidence to the effect that the engineer was unable to operate the power brakes on the train. (T. 670-675)

In the absence of any evidence indicating that the engineer was unable to use and operate the power brakes on the car, petitioner's argument that the trial court should have found a violation of the Safety Appliance Act as a matter of law must fail. The most that can be said for petitioner's evidence is that it marginally entitled him to an instruction on the Safety Appliance Act and submission of that issue to the jury, both of which occurred. The jury specifically found that respondent had not violated the Safety Appliance Act, and the jury's determination should not be disturbed.

CONCLUSION

Petitioner's requested instruction No. 47 was properly refused by the trial court. Petitioner did not present any evidence of a violation of a Federal Railroad Administration regulation at the point where the accident occurred. Neither did petitioner present any evidence at trial relating to the Federal Railroad Administration regulations, nor were the regulations offered into evidence. The highly technical nature of these regulations, without the aid of clarifying testimony, would have only served to confuse the jury.

Petitioner did not present any evidence that the engineer was unable to activate the power brakes on any of the 112 cars comprising Train X-59. Absent such evidence, a violation of the Safety Appliance Act was not established as a matter of law. Thus the trial court properly denied petitioner's motion for a directed verdict, and submitted the Safety Appliance Act issue to the jury.

The trial court properly applied the applicable federal law in this FELA action. Therefore, respondent respectfully requests this Court to deny the petition for writ of certiorari.

Dated: April, 23, 1984.

Respectfully submitted,

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MAY 7, 1984

ALEXANDER L. STEVAS

CLERK

No. 83-1594

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOSEPH A. LaSCALA,

Petitioner,

-against-

BURLINGTON NORTHERN, INC.,

Respondent.

**PETITIONER'S REPLY BRIEF ON PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF MINNESOTA**

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ARGUMENT

I.

**CONTROLLING FEDERAL LAW MANDATED THAT THE
JURY BE INSTRUCTED ON THE FEDERAL RAILROAD
ADMINISTRATION REGULATIONS.**

Respondent asserts that Petitioner Joseph LaScala "did not call any witnesses to testify to any violations" of the FRA regulations, so that the court properly refused to read Petitioner's requested instruction No. 47 on the contents of the regulations and the legal effect of their violation. Respondent's Brief at 5; Requested Instruction No. 47, Petitioner's Brief, A-1 to A-3. Respondent's assertion is directly contradicted by the testimony summarized in Peti-

tioner's Brief. Petitioner's witnesses and Respondent's section foreman, track walker, trainmaster and roadmaster referred specifically to the FRA regulations by name and testified to facts regarding their violation. Petitioner's Brief, at 4-6. Federal law required that the trial court instruct the jury on the regulations and on the legal effect of their violation, which was precisely what Petitioner had requested in instruction No. 47.

Additionally, Respondent has selectively and deviously cited to the record below regarding jury instructions in an apparent attempt to create the impression that Petitioner withdrew his request for an instruction on the FRA regulations. Respondent's Brief, at 6-7. Respondent's argument relates to a dissimilar instruction regarding an itemization of particular acts of alleged negligence by the railroad (T. 687-88). This instruction was withdrawn. *Id.* However, Petitioner did not withdraw the requested instruction No. 47 on the FRA regulations, an instruction that was requested on the day following the dissimilar instruction that Respondent confuses with the FRA instruction. See T. 700-01, reprinted at Petitioner's Brief, A-4 to A-5.

II.

FEDERAL LAW REQUIRED THAT THE COURT FIND A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT AS A MATTER OF LAW.

The relevant portion of the Federal Safety Appliance Act required that the engineer be able to *apply and release* all power brakes on all cars of the train to control the train's speed. Petitioner's Brief at 8-9. Respondent's statement that "the only evidence which Petitioner points to is testimony from one witness, Richard Newburn, that a single hand brake" was tied down is contradicted by Respondent's

admission in an answer to an interrogatory. In the interrogatory answer, which was read to the jury, the railroad conceded that "a hand brake was partially tied down," T. 336-38, confirming and supporting Newburn's testimony as to a violation. (T. 210-12). The partially tied down hand brake could be activated or applied to a greater degree by the engineer, but the railroad has always acknowledged that the engineer could not have *released* the tied-down brake. Therefore, the brakes could not have been "used and operated by the engineer" to "control its speed" in contravention of the federal statute, establishing a violation as a matter of law.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, Joseph LaScala respectfully requests that the Court grant his petition for a writ of certiorari.

Dated: May 3, 1984.

Respectfully submitted,

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